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ALEXANDER L. STEVAS,
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NO. 82-341

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NUECES COUNTY NAVIGATION DISTRICT NO. 1,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, ET AL,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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November 1, 1982

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QUESTIONS PRESENTED

1) Did the Interstate Commerce Commission err in refusing to prescribe rates where (i) there was no showing of common control of rates, a prerequisite to a finding of rate discrimination under 49 U.S.C. § 10741(b), and where (ii) there was no showing of violation of some other aspect of the Interstate Commerce Act?

2) Is there reversible error in the Fifth Circuit's failure to remand certain of the Interstate Commerce Commission orders after finding them moot?

ALPHABETICAL LIST OF PARTIES

Bunge Corporation; intervenor in support of petitioner below; not a party here.

Burlington Northern Railroad Company, as the successor in interest to the St. Louis-San Francisco Railway Company on November 21, 1980; intervenor in support of respondents below and respondent here.

Interstate Commerce Commission; respondent below and respondent here.

Louis Dreyfus Corporation; intervenor in support of petitioner below; not a party here.

Missouri Pacific Railroad Company; special appearance below; respondent here.

Nueces County Navigation District No. 1; petitioner below and petitioner here.

Producers Grain Corporation; petitioner below; not a party here.

Southern Pacific Transportation Company, The Atchison, Topeka and Santa Fe Railway Company, and Houston Port Bureau, Inc.; intervenors in support of respondents below and respondents here.

United States of America; respondent below and respondent here.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINION BELOW AND JURISDICTION

The petitioner has for the purposes of the petition for a writ of certiorari accurately set forth the subject opinions of the Interstate Commerce Commission and the United States Court of Appeals for the Fifth Circuit.

The petitioner has accurately set forth the basis of the jurisdiction of this Court.

STATUTORY PROVISIONS INVOLVED

The petitioner has accurately set forth the involved statutory provisions in Petitioner's Appendix H.

STATEMENT OF FACTS

In its opening statement before the ICC in this rate case, the St. Louis-San Francisco Railway Co. (hereinafter referred to as "Frisco") defended its reduced rates by arguing that they were compelled by motor carrier and rail competition, and that Frisco was willing to extend the rates to Corpus Christi, but that it had been unable, thus far, to obtain the concurrence of the two railroads[1] serving Corpus Christi. Nueces County Navigation District and Dreyfus contested these matters, arguing that Frisco did have control over the rates to Corpus Christi as well as to Houston and that the reduced rates to Houston were in violation of Section 3(1) [49 U.S.C. § 10741].[2] When the Commission issued its order of September 8, 1977, calling for the Frisco to produce evidence showing "that it has made good faith offers of divisions with non-concurring railroads", it became obvious that the issue of whether Frisco had actual control over the subject rates to Corpus

1. The two railroads serving Corpus Christi from points north are the Missouri Pacific Railroad Co. and the Southern Pacific Transportation Co., hereinafter referred to as "MP" and "SP" respectively.

2. Section 3(1) of the Interstate Commerce Act prohibited "undue preference and prejudice" between person, ports, localities, etc., caused by a carrier. Section 3(1) has been recodified and the "preference and prejudice" language of the former Section 3(1) has been replaced so that now a common carrier "may not subject a person, place, port, or type of traffic to unreasonable discrimination." The recodification, enacted on October 17, 1978, stated as its purpose that it was "to revise, codify, and enact without substantive change the Interstate Commerce Act and related laws as Subtitle IV of Title 49, United States Code 'Transportation' ". Public Law 95-473, 95th Congress, Second Session; 92 Stat. 1337; 49 U.S.C. Sections 101, et seq. References herein will be to Section 10741 of Title 49, rather than to Section 3(1) of the old Interstate Commerce Act.

Christi, and whether it had made an offer to provide equivalent service for equivalent rates, in good faith, was paramount in the Commission's consideration of this case.

The Commission's first decision in this case, referred to herein as *Wheat I*, thoroughly reviewed the evidence offered by all parties, and it included a discussion of the cost of service evidence as it related to the issue of whether the Frisco had made a "good faith" offer of divisions in attempting to obtain the concurrence of SP and MP to establish the reduced rate to Corpus Christi. (Pet. App. p. 28a) The decision concluded ultimately that even though the revenues involved to Corpus Christi "could most accurately be described as marginally compensatory", the evidence as a whole showed that Frisco sustained its burden of proving that its division offers were made in good faith and that it, therefore, lacked common control over the rates to Corpus Christi. (Pet. App. pp. 54a-56a)

The ICC subsequently reopened the proceeding and issued its decision referred to herein as *Wheat II* (Pet. App. p. 66a) which further expounded upon the Commission's analysis of the evidence necessary to show a lack of common control over the rates and concluded that the "good faith offer of divisions" was an appropriate test to determine whether Frisco exercised common control. *Wheat II* affirmed the Commission's ruling in *Wheat I* that the reduced rates were not shown to be in violation of Section 3(1) of the Act [49 U.S.C. § 10741].

Nueces County Navigation District No. 1 and Dreyfus appealed to the Fifth Circuit the ICC's decision in

Wheat I and *Wheat II* arguing, *inter alia*, that they were contrary to older ICC cases involving equalization of certain railroad grain rates to Corpus Christi and certain other Gulf ports. Said older "Corpus Christi Port Equalization Cases" had concluded that SP and MP "together with the other carriers which served the Texas ports, acting in conjunction with the originating lines in the origin territory, directly and effectively controlled the rates to all such ports." ICC No. 31098, *Nueces County Navigation District No. 1 v. Abilene and Southern Railway Co., et al.*, 291 ICC 459, 470 (1954). See also ICC No. 33447, *Nueces County Navigation District No. 1 v. Atchison, Topeka & Santa Fe Railway Company, et al.*, 315 ICC 155, 163 (1961).[3] With approval from the Fifth Circuit, the ICC reopened the *Corpus Christi* cases for reconsideration.

The *Corpus Christi* cases involved alleged violations of Section 3(1) of the Act [49 U.S.C. § 10741], and the Commission opinions in each of the cases recite in detail the various arguments made concerning rate comparisons and the comparability of transportation circumstances to and between the allegedly preferred and prejudiced ports. However, each of the decisions contains no real discussion as to the rationale behind the conclusion that the rail carriers control the rates in question. Rather, the ICC's rulings therein that the carriers exercised a network of common control appears to have been largely based on presumption. Indeed, in its order of

3. Respondents note that Petitioner's Appendix has not included the text of the ICC decisions in the Corpus Christi Port Equalization Orders, but has included only the ordering language itself in its Appendices E and F (Pet. App. pp. 110a, 112a). Reference to the ICC Reporter citations above will allow review of the text of the decisions, if necessary. These ICC decisions are referred to hereinafter as the "*Corpus Christi*" cases.

November 15, 1979, reopening the *Corpus Christi* cases, the ICC advised the public that "in the Corpus Christi cases, this Commission presumed common control because the carriers acted as a network, as indicated by both the carriers' joint participation in the rates and their points of track intersection." In said order, the Commission duly advised the public that the earlier *Corpus Christi* cases were based upon a presumption of control, and that the Commission was considering abandoning such presumption, requiring instead in future cases proof of actual control over the joint rates.

Having announced its intentions and calling for comments in the change of policy envisioned in the Commission's reopening of the *Corpus Christi* cases, the Commission handled the reopened cases in accordance with customary procedure and law pertaining to such an exercise of its rulemaking authority. The decision in the reopened *Corpus Christi* cases duly recites the concerns voiced by the parties filing comments, and it contains a reasoned explanation of the change in policy announced by the Commission with respect to cancellation of the port equalization orders at Corpus Christi. (Pet. App. p. 92a) The change in policy adopted by the Commission was to abandon its earlier presumption of "network common control" of rates by railroads, and to substitute a requirement that future rate discrimination cases include proof of actual control of rates. (Pet. App. p. 99a).

SUMMARY OF ARGUMENT

The technical argument of Petitioner that the common control standard is irrelevant in a Section 10741 rate discrimination inquiry because the Commission should have prescribed reduced rates to Corpus Christi is an

argument based upon an erroneous interpretation of law. This Court's decisions in *Ayrshire, infra,* and *New York, infra,* are distinguishable from the instant case in that there the ICC had under consideration issues of reasonableness of rates. Here, where Petitioners failed to prove with substantial evidence that the existing higher rates to Corpus Christi were in excess of a maximum reasonable level, the Commission properly refused to prescribe lower rates. It was not arbitrary nor an abuse of discretion for the Commission to have declined to prescribe rates where Petitioners, having failed to prove a violation of Section 10741, also failed to show any other violation of the Interstate Commerce Act.

ARGUMENT

Petitioner's primary argument is that the ICC has erred in ruling below that "a rate cannot be prescribed absent common control unless there is some other violation of the act". (Pet. App. 106a) Petitioner's argument confuses the ICC's authority to prescribe rates, by failing to clarify that the basic issue before the ICC in this case was whether or not the reduced rate violated the "unreasonable discrimination" standard set forth in 49 U.S.C. § 10741(b). The *Wheat* cases did not involve any serious claim of an unreasonable level of rates, and the ICC found that "the evidence of record, including cost evidence relating to through movements, amply demonstrates that the present and proposed rates are just and reasonable." (Pet. App. 56a) It is vital to recognize that the subject ICC decision was a "discrimination case" rather than a "rate reasonableness case" because the authorities relied upon by Petitioner, in which this Court approved ICC prescription of rates, are distinguishable in that they did not involve solely the discrimination issue.

The Common Control Concept

Petitioner commences its argument by claiming false reliance by the ICC and the Fifth Circuit upon *Central R.R. Co. of New Jersey v. United States*, 257 U.S. 247, 259 (1921). Respondents confirm the language quoted by Petitioner but take issue with the statement that the excerpt provided by the ICC and the court below causes a distortion of the true meaning of the opinion in *Central R.R. Co.* In fact, further reading of the opinion suggests that the distortion lies more in the quotation provided by Petitioner. To complete the train of thought begun in the sentence quoted at Petitioner's page 9 requires further reading, to-wit:

> They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination, as where a lower joint rate is given to one locality than to another similarly situated. If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers. If that rule should prevail, only uniformity and local privileges and practices, or the cancellation of all joint rates, could afford the carriers the assurance that they were not in some way violating the provisions of Section 3. *Id.*

As can be seen from the more complete reading, the Court supports the view taken by Respondents herein that a carrier's culpability should not depend on the acts of its connecting carriers but rather should depend solely on its own acts.

Petitioner errs in its claim at page 14 of the Petition that in *Texas & Pacific Ry. Co. v. United States*, 289 U.S.

627 (1933) no mention is made of a carrier, or a group of carriers, having "control" over the rates. Rather, the Court states therein the following at 289 U.S. at 649:

> "Where . . . a carrier whose lines reach, or which *controls* the rate to, one of the destination, is a party to a joint rate to the other but cannot make or *control* the latter rate . . . it cannot be held responsible nor can any other to remove the prejudice run against it . . ." (Emphasis added)

The thrust of the decisions in *Central Railroad Company* and *Texas & Pacific, supra,* is that a connecting carrier must have some involvement, or some culpability, before the Commission can enter a "rate discrimination order" against it under § 10741. As pointed out by the ICC in *Wheat, I,* it is well established in "commerce law" that to support a violation of § 10741 there must be evidence of: (1) a disparity in rates, (2) actual or potential competitive injury to protestants, (3) common control of rates to both the preferred and prejudiced ports by the respondent carriers, and (4) comparability of transportation conditions at both the preferred and prejudiced ports. (Pet. App. 51a) This four part test was upheld in *Chicago & Eastern Illinois R. Co. v. United States,* 384 F.Supp. 298, 300-301 (N.D. Ill. 1974), aff'd 421 U.S. 956 (1975). The four part test, including the requirement of a showing of common control, has been used by the Commission for many years. See *Fresh Meats, Illinois . . . to Florida,* 318 ICC 5, 10 (1962); *Big River Industries, Inc. v. Aberdeen and Rockfish R.R. Co.,* 329 ICC 539, 541 (1967).

Petitioner argues that Congress was displeased by the holding in *Texas & Pacific,* noting that former Section

3(1) of the Act was amended after the decision. However, the changes in Section 3(1) in no way reflect on the matters from *Texas & Pacific* that are pertinent to the issues in the case at bar. The amendments merely broadened the scope of the discrimination prohibited by that section.

In attributing error to the analysis of the actual common control standard by the ICC and the Fifth Circuit, Petitioner relies heavily upon two Supreme Court cases which it interprets to *mandate* the issuance of a rate prescription order under the instant facts. However, these cases are distinguishable from the present controversy because neither involved the issue of port equalization and because in such cases the carriers were found to have violated another provision of the Act, hence establishing independent authority for the Commission's issuance of a rate prescription.

New York v. United States, 331 U.S. 284 (1947), involved an attempt to set aside interim orders of the Interstate Commerce Commission which either raised or lowered interstate class rates, depending upon the *territory* involved. In upholding the Commission's power to eliminate territorial discrimination under § 15(1) [49 U.S.C. § 10704], the Court stated:

> It may not be said in this case, as it was held in *Texas & Pacific R. Co. v. United States, supra,* p. 663, that there was no evidence of the unreasonableness of the rates, or that the question was not in issue. *The Commission here found that the rates were unjust and unreasonable under § 1 and it proceeded to fix new rates under § 15(1). The facts* which established that the differences in rates as between the several territories are not warranted by

territorial conditions *plainly sustain its finding under § 1. Id.*, at 343 (emphasis supplied)

It is clear from the above that Petitioner cannot properly rely upon *New York* to establish the Commission's authority to enter a former § 15(1) order [49 U.S.C. § 10704] to cure discrimination without a finding of common control or the existence of another violation of the Act. And, under no circumstance can *New York* be interpreted to require the Commission to issue a rate prescription in a rate discrimination case where at most only three of the four elements which historically have constituted a § 3(1) unreasonable discrimination violation at 49 U.S.C. § 10741 are present.

The other case which Petitioner alleges supports the Commission's ability to find a rate discrimination violation [49 U.S.C. § 10741] absent common control is *Ayrshire Corp. v. United States,* 335 U.S. 573 (1949). There the Court upheld Commission orders equalizing rail rates on bituminous coal from various midwestern origins This case is also distinguishable from the issues at hand because it involved the equalization of *group* rates and the Commission's orders were based upon the finding of a violation of former § 2 as well as § 3(1), both provisions now recodified at 49 U.S.C. § 10741.

Relying on *New York* and *Ayrshire,* Petitioner suggests that § 10704 of the Interstate Commerce Act is independent authority for the ICC to prescribe a rate to remedy a discrimination, regardless of whether such discrimination results from the actual control of the rates by the same carrier and without which a discrimination cannot be termed unreasonable. But as § 15(1) [now 49 U.S.C. § 10704] clearly indicated, the Commission's

power to prescribe a just and reasonable rate can only be exercised when a rate, fare, or charge "is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act."

The Commission's § 10704 authority over a rail carriers' rates is directly dependent upon the existence of a violation of some other provision of the Act. This obvious limitation was properly recognized by the Commission in its decision herein:

> "Section 10704 [§ 15(1)] is a remedial section of the act which provides for the prescription of maximum or minimum rates once there has been a violation of one of the substantive parts of the act. Unreasonable discrimination is such a substantive provision; common control is merely one of the case law developed criteria for a finding of unreasonable discrimination. Therefore, a rate cannot be prescribed absent common control unless there is some other violation of the Act." (Pet. App. 106a)

In challenging the above language of the ICC, Petitioners fail to recognize that where a complainant seeks a finding of unreasonable discrimination, the ICC will not hold the discrimination to be unreasonable in violation of the Act unless the challenged rates are under the actual common control of defendant carriers. The Commission has merely restated its position taken in numerous ICC cases that a discrimination cannot be "unreasonable" or a preference or prejudice "unjust" unless a finding of common control is made. Every one of the four elements which constitute an unreasonable discrimination must exist before the Commission is empowered to exercise its remedial authority.

Rather than authority for the Commission to ignore the need to find common control in finding undue discrimination, *New York* and *Ayrshire* are concerned with the power of the Commission to enforce a remedy *after* a proper finding of undue preference and prejudice. This is the fundamental distinction between these decisions and the decisions of *Central R.R.*, and *Texas & Pacific Ry., supra,* which demonstrate the meaning of undue preference and prejudice under the Act as applied to carriers. Not only is it clear these cases refer to the nature of a remedy, but the Court in both cases left intact and undisturbed the essential interpretation of former § 3(1) of the Act [now 49 U.S.C. § 10741] as determined in *Texas & Pacific Ry.*

Petitioners claim that because *New York, supra,* arose after the amendment to the Interstate Commerce Act which added ports and territories to § 3(1) of the Act, the fundamental meaning of undue preference and prejudice under the Act was altered. This is, of course, inaccurate. The Court in *New York* dealt with territorial discrimination arising as a result of rates which were found to be unreasonable and then enforced a remedy under § 15 [now 49 U.S.C. § 10704] to prescribe *reasonable* rates. The Court demonstrated the distinction between that power, in former § 15(1), and the necessity for a proper finding of preference or prejudice. The Court stated, at 331 U.S. at 341:

> "Section 15(1) provides that when the Commission finds that "any individual or joint rate, fare, or charge" of a common carrier is "unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial," the Commission may determine and prescribe "what will be the just and reasonable" rate.

> And see § 15(3). The words "unjustly discriminatory or unduly preferential or prejudicial" plainly refer to practices condemned by § 3(1). *A proper finding of unlawful discrimination under § 3(1) thus enables* the Commission not only to direct the carriers to eliminate the practice but also, pursuant to § 15, to prescribe the alternative. (emphasis supplied)

The Commission's actual control test requires such a "proper finding" of undue discrimination in accord with the specific holding of *Texas & Pacific Ry., supra.* As the Court likewise stated in *Ayrshire Collieries v. United States,* 335 U.S. 573, 594 (1948):

> "As we noted above, the present proceeding was under § 15(1) and § 15(7). Section 15(1) gives the Commission power to determine and prescribe the just and reasonable rate *once it finds, inter alia,* that any rate charged is unjustly discriminatory or unduly preferential or prejudicial." (emphasis supplied)

In both *New York* and *Ayrshire Collieries,* the focus of the Commission's action was on the remedy to cure an unreasonable level of discriminatory rates. The level of unreasonableness of the reduced rates in this proceeding is not even at issue. On the fundamental meaning of undue preference and common control of rates, *New York* left *Texas & Pacific Ry.,* undisturbed. The Court specifically refused to rule on the question of control of rates, even on an interterriorial basis, because the *control* of rates under former § 3(1) [now 49 U.S.C. § 10741] was not in issue. *Texas & Pacific* was left unchallenged in *New York,* as the Court stated, 331 U.S. at 342:

> "For the principle announced in *Central R. Co. v. United States* and *Texas & Pacific R. Co. v. United*

> *States, supra,* is applicable only where the Commission is directing the carriers to remove the discrimination. *Those cases hold that the Commission may not require carriers to do what they are powerless to perform.*" (emphasis supplied)

Intervening Respondents submit that the foregoing discussion indicates there is no basis whatsoever for this Court to conclude that the Fifth Circuit's decision below is contrary in any respect to the decisions of this Court cited by Petitioner. The circular nature of Petitioner's reasoning is perhaps best illustrated by the following excerpt from Page 18 of the Petition:

> "*New York* and *Ayrshire* make it very plain the ICC is in error when it holds it cannot correct a discriminatory rate situation without finding common control by one or more carriers. It is even more in error when it says it cannot, or will not, strike down rates which are unjustly discriminatory unless it finds such rates also contravene some other prohibition of the Act."

In making the above argument, Petitioner has assumed, without admitting it, that a finding of common control is not a prerequisite to determining that a rate is discriminatory. Contrary to Petitioner's assertion, the ICC did not find the rate to be discriminatory and that result was based upon its finding that there was no showing of common control.

Failure To Agree On Divisions

Petitioner attacks the actual common control standard as unreasonable and impossible to apply, claiming that carriers will be able easily to evade a finding of common control by merely refusing to agree on division of the

proposed joint rates. However, the actual common control standard is supplemented by the Commission's "good faith offer of divisions" test which will negate any possibility of carrier abuse under the new standard. The Commission's decision has considered the needs and provided balanced protections for the ports and carriers alike.

Under the Commission's actual common control standard, the Commission has recognized the fact that a violation of § 10741 is not a matter to be assumed from a mere disparity in rates. Under such standard, if a destination or other connecting carrier refuses to participate in joint equalized rates, the origin and connecting carriers will not be considered as acting in concert, and the carrier who has initiated a single line rate change will be deemed not to control the rates to the differently treated ports.

The ICC's decision under appeal contains a rational discussion of Congressional policy under the Railroad Revitalization and Regulatory Reform Act of 1976 which mandates greater future ratemaking flexibility for railroads in competitive situations. (Pet. App. 107a) The "good faith offer of divisions" test comports with this policy since it recognizes that connecting carriers are under no definite obligation to agree to new reduced joint rates proposed by originating carriers. Contrary to the assertions of Petitioner, the "good faith offer of divisions" test gives any party claiming rate discrimination a definite formula for developing factual evidence bearing upon which railroads can "control" the rates complained of. No case cited by Petitioner gives any supportable basis for faulting the use of evidence regarding divisions as an indicator of common control in a rate discrimination case.

Scope Of Judicial Review

Petitioner claims that the ICC has made errors of law and has acted arbitrarily. This Court is well aware of the terms of Section 706 of the Administrative Procedure Act, which sets forth the criteria for judicial review of agency action. The Fifth Circuit was authorized to set aside the ICC's decisions only if it found them to be:

> "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> "(B) contrary to constitutional right, power, privilege, or immunity;
>
> "(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> "(D) without observance of procedure required by law;
>
> "(E) unsupported by substantial evidence . . ." U.S.C. Section 706 (1966).

The above standard of review was generally the law of the land even prior to adoption of the Administrative Procedure Act. *Manufacturers R. Co. v. United States*, 246 U.S. 457, 481, 62 L.Ed. 831 (1918).

It is generally accepted that a reviewing court will accord particular deference to an agency decision in the area of factual responsibility delegated to it by Congress. This Court has noted that ICC ratemaking is such an area of agency expertise, stating:

> "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent

> expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems."

Board of Trade of Kansas City v. United States, 314 U.S. 534, 546, 86 L.Ed. 432 (1942).

A landmark case ruling upon the scope of judicial review of ICC decisions is *The Atchison, Topeka and Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 809, 37 L.Ed.2d 350 (1973), where this Court concluded that:

> "It is enough to satisfy the requirements of judicial oversight of administrative action if the agency asserts distinctions that, when fairly and sympathetically read in the context of the entire opinion of the agency, reveal the policies it is pursuing. So long as the policies can be discerned, the court may exercise its proper function of determining whether the agency's policies are consistent with congressional directives."

The above standard is the proper measure for reviewing the instant ICC's decisions. Applying said standard here shows that the ICC amply explained its basis for applying the "good faith offer of divisions" test to ascertain whether the Frisco had offered equivalent service at equivalent rates to Corpus Christi, thereby showing that it lacked common control of the rates to Corpus Christi. Likewise, under said standard of review, the vacation of the Corpus Christi rate equalization orders, and the cancellation of the presumption of railroad network control of rates was properly within the discretion of the ICC, and the ICC's action was rationally articulated as being within its Congressionally delegated authority.

Mootness

Petitioner, relying on the line of cases following *United States v. Munsingwear, Inc.*, 340 U.S. 360, 71 S.Ct. 104, 95 L.Ed. 36 (1950), alleges that the Fifth Circuit committed a procedural error by dismissing, instead of remanding to the ICC with directions to dismiss, Docket Numbers 78-1348, 79-1816, and 80-1842 (the *Wheat* cases). This complaint is apparently directed at the res judicata effect accorded the aforementioned docket numbers. As regards future rates to Corpus Christi, or any future claim of rate discrimination, any such future rate complaints will be litigated on a case by case basis. However, the underlying issue in the *Wheat* cases was the concept of common control which was finalized in the ICC's decision herein cancelling the *Corpus Christi* cases and is the primary subject of this appeal.

Petitioner admits that the ICC's decision cancelling the *Corpus Christi* cases (Pet. App. p. 92a) is not moot. Therein the ICC modified to a certain extent its decisions in the *Wheat* cases and reaffirmed its discussion therein of the actual control standard. (Pet. App. 107a, 108a) Accordingly, no legitimate purpose would have been served if the Fifth Circuit had, on grounds of mootness, required the ICC to dismiss the *Wheat* cases and thereby create doubt as to the significance of the ICC's references to the *Wheat* cases in its decision cancelling the *Corpus Christi* cases. There is no reversible procedural error on the mootness point which warrants review by this Court.

CONCLUSION

Petitioner has presented no supportable basis for granting the petition for a writ of certiorari. Petitioner's primary

objection is that the Fifth Circuit saw no error in the Interstate Commerce Commission's ruling that actual common control of rates is a prerequisite to proving rate discrimination under 49 U.S.C. § 10741(b) and that evidence regarding a "good faith offer of divisions" is one manner of illustrating actual common control. The Interstate Commerce Commission ruling on this point is in accordance with the law and it has presented a rational and articulate discussion of the basis for its ruling. Accordingly, there is no reversible error and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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